

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Application for the Transfer of *De Facto* Control of
Leased Spectrum from SprintCom, Inc. to Alaska
DigiTel, LLC

ULS Application No. 0003253513

In the Matter of

WT Docket No. 06-114

Applications for the Assignment of Licenses from
Denali PCS LLC to Alaska DigiTel, LLC and the
Transfer of Control of Interests in Alaska DigiTel,
LLC to General Communication, Inc.

**ACSW'S REPLY TO THE JOINT OPPOSITION OF SPRINT/DIGITEL AND
LIMITED OPPOSITION OF GCI**

I. Introduction

The Oppositions filed by General Communication, Inc. ("GCI"),¹ and Alaska DigiTel, LLC ("DigiTel")/ SprintCom, Inc. ("Sprint")² fundamentally mischaracterize the nature of the objections raised by ACS Wireless, Inc. ("ACSW") in its Petition to Deny and Objections ("Petition") to the Sprint/DigiTel *de facto* transfer lease application.³ ACSW does not seek to obstruct the application process or to "resurrect discredited charges."⁴ The Petition presents a reasonable request that the Commission carry out its

¹ Limited Opposition of General Communication, Inc. to the Petition to Deny and Objections of ACS Wireless, Inc., ULS Application No. 0003253513, filed January 15, 2008, ("GCI Opposition").

² Joint Opposition to Petition to Deny and Objections of ACS Wireless, Inc., ULS Application No. 0003253513, filed January 16, 2008 ("Sprint/DigiTel Opposition").

³ Application for the Transfer of *De Facto* Control of Leased Spectrum from SprintCom, Inc. to Alaska DigiTel, LLC, ULS Application No. 0003253513 ("Application").

⁴ GCI Opposition at i.

public interest duties to promote competition in the Alaska marketplace by carefully reviewing a transaction that may be evidence of coordinated anti-competitive conduct.

The evidence demonstrates that GCI's relationship with DigiTel may be more involved than the investor with "non-controlling investor protections" status that GCI described in WT Docket No. 06-114.⁵ ACSW's concerns are well-grounded, reasonable, and properly presented.

II. The Petition to Deny is Based on Specific Factual Concerns about GCI's Potential Anti-competitive Conduct That Are Reinforced in GCI's Opposition

GCI, Sprint, and DigiTel are too quick to dismiss the facts that ACSW raises in its Petition. In their rush to label every allegation as speculative and baseless, the parties overlook three critical factors.

First, the very nature of the anti-competitive conduct alleged by ACSW makes it virtually impossible to prove conclusively. ACSW does not have access to every internal document governing the relationship between GCI, Sprint, and DigiTel.⁶ The Commission, however, has both the authority and the obligation to check for fire when smoke is brought to its attention. ACSW has asked that Sprint submit agreements that may be directly or indirectly related to the lease transaction for review. This is a reasonable request, and appropriate, particularly in light of changed circumstances. The

⁵ See, e.g., Joint Opposition to MTA Wireless' Supplemental Comments, filed by General Communication, Inc., Denali PCS LLC and Alaska DigiTel LLC, WT Docket 06-114, (August 8, 2006) at 13.

⁶ ACSW disposed of all WT Docket No. 06-114 confidential information in its files. See, GCI Opposition, Attachment 1. Therefore, ACSW no longer possesses any of the Sprint agreements that parties were allowed to review in WT Docket No. 06-114 subject to Protective Order.

officers of ACS are unable to provide more information because of Non-Disclosure Agreements in place.

Second, ACSW has in fact shown good cause that the Sprint/DigiTel Lease Agreement may be evidence of an anti-competitive coordinated arrangement in response to the Commission's explicit invitation to present future evidence of anti-competitive conduct.⁷ Though the Commission was assured in WT Docket No. 06-114 that the Sprint/DigiTel relationship would become far more limited, in fact, DigiTel and Sprint have become even more integrated. Not only did Sprint and DigiTel renew their Service Agreement which was set to expire in December, 2006, but now Sprint has leased its spectrum for DigiTel to use in all the major population centers of the state. The spectrum lease may be directly related to the Sprint/DigiTel roaming arrangement because it provides DigiTel more spectrum for carrying Sprint's roaming traffic. ACSW brings this substantial change to the Commission's attention not to pry into the internal dealings of its competitors but rather to question the competitive risks of the Sprint/DigiTel/GCI relationships.

Third, GCI's statements in its Opposition raise additional concerns. GCI admits that it has amended its wholesale transport agreement with Sprint "on occasion".⁸ Therefore, GCI may indeed have had an opportunity to renegotiate the terms of that Agreement with Sprint while Sprint was negotiating with Alaska carriers to service its other needs in Alaska, such as roaming. If the Commission reviews the GCI/Sprint

⁷ See, Applications for the Assignment of Licenses from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communication, Inc., WT Docket No. 06-114, *Memorandum Opinion and Order*, 21 FCC Rcd. 14863 (2006) at ¶106. ("GCI/DigiTel Order).

⁸ See, GCI Opposition at 11.

transport agreement amendments, and the Sprint/DigiTel roaming agreement, it can look for direct or indirect evidence of coordination.

Also, the narrowness of William C. Behnke's Declaration raises questions about whether GCI is deliberately omitting parts of the story. Mr. Behnke only attests to the truth of two factual averments: (a) the competitive situation in Alaska, and (b) the nature of the business arrangements between GCI and Sprint on the one hand, and between GCI and DigiTel on the other hand.⁹ It appears Mr. Behnke has not attested to the truth of GCI's statement that "GCI has not tied its provision of wholesale transport services to Sprint to the roaming arrangement between Sprint and AKD."¹⁰

The Commission should ask GCI to clarify this issue. GCI should submit a Declaration of an Officer or Executive at the highest level of the company who had knowledge of GCI's wholesale transport negotiation with Sprint and DigiTel's roaming negotiation with Sprint to attest that there was no interrelationship, direct or indirect, between the two arrangements. For completeness, the Declaration should attest that no contract GCI entered into with Sprint was tied directly or indirectly to DigiTel's roaming agreement with Sprint (i.e., attest as well that GCI's contract with Sprint for termination of GCI's traffic in the Lower 48 was not tied in any direct or indirect manner to DigiTel's roaming agreement with Sprint). If GCI did not have any knowledge of roaming discussions between DigiTel and Sprint, it could offer a Declaration of an Executive at

⁹ See, GCI Opposition, Attachment 2.

¹⁰ See, GCI Opposition at 10.

the highest level of the company to attest that no one at GCI was privy to those discussions.¹¹

Such questions are valid and merit further investigation by the Commission. It oversimplifies the issue to allege that ACSW has engaged in obstruction or baseless speculation by calling this matter to the Commission's attention.¹²

III. The Applicants Have Not Demonstrated That the *De Facto* Transfer Satisfies the Public Interest Requirements of the Act

The Applicants' cursory claim of public interest benefit is insufficient in light of legitimate concerns that the lease may be evidence of a coordinated arrangement driven by GCI's anti-competitive conduct. GCI contends that all references to WT Docket No. 06-114 are irrelevant and invalid. However, the Commission expressly found in that case that GCI's acquisition of 78% interest in DigiTel *would increase the potential for coordinated interaction based on various contracts entered into by and the corporate structure of GCI/DigiTel/Denali*.¹³ Moreover, in concurring statements, both Commissioners Copps and Adelstein urged that the Commission monitor the market carefully in the future for evidence of anti-competitive conduct.

¹¹ It appears highly likely that GCI had knowledge of DigiTel's discussions with Sprint. The DigiTel/Sprint roaming agreement was important enough to GCI for GCI to mention it on its most recent earnings call on November 11, 2007. Presumably, GCI received status updates on the negotiations from DigiTel, and therefore, could report on the call that the Agreement had been finalized.

¹² Both GCI and Sprint/DigiTel suggest ACS does not want to engage in real marketplace competition because it "complains" that it has to take the extraordinary step of building its own fiber optic cable between Alaska and the Lower 48. See, Sprint/DigiTel Opposition at 7; GCI Opposition at 12. Certainly, constructing a fiber optic cable between Alaska and the Lower 48 at a cost of approximately \$95 million qualifies as an "extraordinary" event for ACS. It has never undertaken construction of this magnitude.

¹³ See, GCI/DigiTel Order, at ¶ 116.

Commissioner Copps found approval of GCI's acquisition of 78% interest in DigiTel a "close call" after weighing the transaction's proposed benefits and risks of anti-competitive harm.¹⁴ In his concurring statement, he urged that the Commission act quickly in response to any evidence of anti-competitive conduct:

We have an obligation in transactions coming before the Commission to weigh their proposed benefits against their potential harms to ensure that the transaction is in the public interest. For me, this particular transaction was a close call. There are benefits to this proposed transaction...At the same time, as the order points out, there is a real potential for post-transaction coordinated interaction among the applicants and through contracts with third parties...*[T]he Commission should keep a careful eye on future developments in the market and act swiftly in response to any evidence of anti-competitive or anti-consumer tactics.* The good people of Alaska deserve no less.¹⁵

Commissioner Adelstein expressed similar concerns, and urged that the Commission continue to monitor the market carefully for evidence of anti-competitive conduct. As Commissioner Adelstein explained in his concurring statement:

This is a surprisingly complicated set of assignment and transfer of control applications. I cannot recall a transaction that implicates so many of the major communications providers in a market because of the variety of overlapping business arrangements and ventures. I have tried to ask the hard questions regarding this transaction...*[B]ut it feels like we are leaving a stone unturned here – there is more to this transaction than meets the eye...[F]or the sake of Alaskans, I encourage the Commission to monitor this market carefully to make sure our conditions have the required effect of promoting a vibrant and competitive marketplace.*¹⁶

Both Commissioners recognized the danger of anti-competitive behavior inherent in GCI's acquisition of a 78% interest in DigiTel. Their specific admonitions and calls for

¹⁴ Concurring Statement of Commissioner Michael J. Copps, GCI/DigiTel Order, at 14918 (emphasis added).

¹⁵ *Id.*

¹⁶ Concurring Statement of Commissioner Jonathan S. Adelstein, GCI/DigiTel Order, at 14919 (emphasis added).

the Commission to remain vigilant in the Alaska marketplace stand in stark contrast to the seemingly insurmountable burden put forth by GCI.

Having been put on notice by the Commissioners that legitimate concerns remained following the GCI/DigiTel Order, GCI should not be surprised that the Application raised red flags. GCI was undoubtedly aware that questions about its relationship with DigiTel would need to be addressed in future transactions. The Applicants' cursory public interest conclusions simply cannot withstand the level of scrutiny appropriate in these circumstances.

IV. Conclusion

For these reasons, ACSW asks that the Commission investigate the Lease Agreement to determine whether it relates directly or indirectly to any anti-competitive conduct by GCI in providing wholesale transport to Sprint to terminate its Lower 48 traffic in Alaska. It should take all actions necessary to conduct this investigation fully, including requiring Sprint to file any agreements it has with DigiTel concerning its use of DigiTel's facilities in Alaska, and with GCI concerning its use of GCI's wholesale transport facilities between Alaska and the Lower 48, as well as conduct an evidentiary hearing.

Dated this 23rd day of January, 2008.

/s/ Leonard Steinberg

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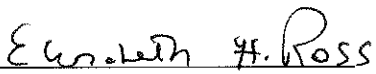
CERTIFICATE OF SERVICE

I, Elisabeth H. Ross, hereby certify that copies of the **ACSW's Reply to the Joint Opposition of Sprint/DigiTel And Limited Opposition Of GCI** were served this 23rd day of January, 2008 via U.S. first class mail, postage prepaid and via email, upon the following:

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